No. 98-536

In The

Supreme Court of the United States

October Term, 1998

TOMMY OLMSTEAD, Commissioner of the Department Of Human Resources of the State of Georgia, RONALD C. HOGAN, Superintendent of Georgia Regional Hospital/Atlanta, and EARNESTINE PITTMAN, Executive Director of the Fulton County Regional Board,

Petitioners,

v.

L.C. and E.W., each by JONATHAN ZIMRING as guardian ad litem and next friend,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Georgia provides for the treatment of its mentally disabled citizens in two main types of residential settings: institutional facilities, and a wide range of settings called "community placements." The State's choice of setting for individuals requiring public care depends on their mental condition, on the fact and extent of their dangerousness and inability to care for themselves, and on fiscal and administrative considerations.

The question presented is:

> Whether Title IIA of the Americans with Disabilities Act, 42 U.S.C. § 12132, compels the State to provide treatment for mentally disabled persons in a community placement, when appropriate treatment can also be provided to them in a State hospital.

PARTIES BELOW

The parties to the proceedings in the court of appeals and in the district court were as listed in the caption, except that pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Ronald C. Hogan has been automatically substituted for Richard Fields, due to Hogan's succeeding Fields as Superintendent of Georgia Regional Hospital at Atlanta.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 138 F.3d 893 (1998), and is included in the appendix to the State's petition for a writ of certiorari ("Pet."). *See* Pet. 1a-30a. The order on the merits by the United States District Court for the Northern District of Georgia, No. 1:95-CV-1210-MHS, 1997 WL 148674 (Mar. 26, 1997) is unreported. *See* Pet. 31a-42a.

JURISDICTION

The court of appeals entered its opinion and judgment on April 8, 1998 (Pet. 1a) and entered its denial of Petitioners' Motion for Rehearing and Suggestion of Rehearing En Banc on July 1, 1998 (Pet. 43a). The petition for a writ of certiorari was filed on September 29, 1998, and this Court granted the petition on December 14, 1998.

STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 12132 (1994) (the Americans With Disabilities Act of 1990):

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

28 C.F.R. § 35.130(d) (1998):

> A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

STATEMENT OF THE CASE

This case represents an attempt by a federal agency with no historic expertise in the area of mental health care to resolve a complex social and medical debate through the general terms of the Americans with Disabilities Act (the ADA). 42 U.S.C. § 12132 (1994). This is not the first national effort to impose a one-size-fits-all solution to an intricate medical problem – here, institutionalization versus deinstitutionalization of mental health care – through an expansive interpretation of federal law. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Alexander v. Choate*, 469 U.S. 287 (1985); *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986); *Traynor v. Turnage*, 485 U.S. 535 (1988). Nor is it the first time that litigants have argued that a federal statute compels the States to provide care for the mentally disabled in the "least restrictive" environment. See *Pennhurst*.

While this Court has rejected these interpretations in the past, the Eleventh Circuit in this action accepted the contention that the ADA imposes an affirmative obligation on the States to provide psychiatric care in the "least restrictive" setting, which generally will require community rather than hospital care. Before demonstrating why

that conclusion is wrong, it is appropriate to discuss briefly the history of mental health care in this country. This history sets the stage for today's dispute and establishes a context for resolving it.

A. Mental Health Care in the United States

Viewed over the long sweep of history, hospitals for the care and treatment of mentally disabled persons are recent innovations. During the American colonial period, the care of mentally disabled persons was entrusted to their families or, failing that, to jails, poorhouses, or boarding arrangements financed by local communities. GERALD N. GROB, MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875 4-12 (1973).

The need for separate facilities to care for the mentally disabled arose from the sheer growth of the colonies' population and from the inhumane treatment inflicted on the disabled in community settings. See *O'Connor v. Donaldson*, 422 U.S. 563, 582 (1975) (Burger, C.J., concurring); GROB, *supra*, at 13; Dorothea Lynde Dix, *Appeal on Behalf of the Insane of Massachusetts*, *in* CHARLES E. GOSHEN, DOCUMENTARY HISTORY OF PSYCHIATRY 502-04 (1967). While the first two hospitals that cared for the mentally ill were founded before the Revolutionary War, there were still only six such facilities by 1830. Samuel W. Hamilton, *The History of American Mental Hospitals*, *in* ONE HUNDRED YEARS OF AMERICAN PSYCHIATRY 73-78, 153 (J.K. Hall, Gregory Zilboorg, & Henry Alden Bunker eds., 1944).

From 1830 onward, public pressure, poor community care conditions, as well as new pressure from vocal

reformers such as Dorothea Dix, prompted State after State to open at least one mental hospital. As a result of this development, more than 75 public facilities existed by 1880. Hamilton, *supra*, at 153-56; Dix, *supra*.

Following this national trend, Georgia opened its first State mental hospital in 1842. In doing so, the Georgia governor told the legislature that "[h]umanity requires that a comfortable place of refuge should be provided for the [mentally ill], to alleviate their sufferings, and to protect the community against their involuntary acts; and that such as are indigent should be maintained at the public expense." 1836 Ga. House J. 21; *see* 1841 Ga. Laws 153. The governor's dual rationale for civil commitment – the *parens patriae* interest in providing care and treatment for the disabled, and the police power concern for the public safety – typified early State rationales for commitment, which persisted until at least the early 1960s. See, e.g., *In re Oakes*, 8 Law Rep. 123, 125 (Mass. 1845); Frank T. Lindman & Donald M. McIntyre, Jr., The Mentally Disabled And The Law 17-18 (1st ed. 1961).

Throughout this period, the States periodically changed their procedural requirements for involuntary civil commitment, sometimes tightening them and at other times relaxing them. Paul S. Appelbaum, Almost A Revolution: Mental Health Law And The Limits Of Change 20 (1994); Samuel Jan Brakel, John Parry & Barbara A. Weiner, The Mentally Disabled And The Law 15 (3d ed. 1985). But there was no widespread sentiment for closing hospitals or deinstitutionalizing care during this period. The main concern lay in finding ways to improve

the hospitals. Gerald N. Grob, From Asylum To Community: Mental Health Policy In Modern America 3 (1991).

Seeds of change were planted soon after World War II. A number of sociologists formulated theories that ultimately led to the conclusion that either mental illness did not exist and thus no hospital treatment was necessary for it, or if it did exist, then it could be treated in "community" facilities. Appelbaum, *supra*, at 4-9; Grob (1991), *supra*, at 283-88. Also, the advent of effective antipsychotic medications in the early 1950s held out the promise of successful community treatment for many. See *Mills v. Rogers*, 457 U.S. 291, 293 n.1 (1982).

By the early 1960s, the new sociological theories had gained currency with small but influential groups within the psychiatric and legal communities. Partly as a result of that change, the Community Mental Health Centers Act of 1963, P.L. 88-164, 77 Stat. 290, was enacted. The law funded the construction of such centers in all participating States and eventually funded staffing grants for distribution by the National Institute of Mental Health directly to local sponsors of community mental health centers, rather than through State mental health authorities. Murray Levine, The History and Politics of Community Mental Health, 53-55 (1981).

The next 20 years saw remarkable ferment in mental health law. By its end, many States had rewritten their statutes to provide a wide range of protections for the disabled – a very narrow basis for civil commitment, a full panoply of procedural safeguards for commitment, a right to treatment, a right to refuse treatment, and a right to be treated in the "least restrictive" setting. *See* Brakel,

PARRY & WEINER, *supra*, at 21-33. While this Court addressed some of these issues under federal law, it consistently found that the Constitution does not guarantee unqualified individual rights in this area. See, e.g., *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (mental illness without dangerousness cannot serve as a basis for purely custodial care); *Addington v. Texas*, 441 U.S. 418 (1979) (beyond-a-reasonable-doubt standard of proof not required for commitment hearing); *Parham v. J.R.*, 442 U.S. 584 (1979) (judicial proceeding not required for admission of minors to mental hospitals); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (right to habilitation limited to minimally adequate or reasonable training to ensure safety and freedom from undue restraint).

By the mid-1980s, these changes in mental-health law, together with the availability of antipsychotic medication, led to large transfers of patients from State mental hospitals into communities across the country. Government figures show that

> [t]he census of state mental hospitals was reduced by 197,921 individuals during the 1960s, and this reduction continued during the 1970s by another 205,455 persons. . . . Altogether between 1955 and 1984 a total of 433,407 beds in state mental hospitals were taken out of use, or 80 percent of the 552,150 beds occupied in 1955.

E. FULLER TORREY, NOWHERE TO GO: THE TRAGIC ODYSSEY OF THE HOMELESS MENTALLY ILL, 139, 219 (1988) (using data from National Institute of Mental Health). A comparison between 1955 and 1994 shows that the nation had an

actual mental health hospitalization decrease of 82 percent and an effective decrease (considering national population change) of 91.3 percent. E. FULLER TORREY, OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL HEALTH CRISIS, 205-07 (1997).

B. Current Mental Health Care in Georgia

Georgia's delivery of mental health services has been affected by these national trends. In 1978, the General Assembly overhauled its Mental Health, Mental Retardation, and Substance Abuse Codes. As a result, Georgia law now permits involuntary hospitalization only after an extensive hearing and only upon the satisfaction of stringent standards of dangerousness or inability to care for one's self. There is a right to the least restrictive alternative placement, within the limits of state funds specifically appropriated for such care; a right to treatment; a right to refuse treatment; a right to petition the court for release or for protection of institutional rights; and a right to release at any time that the chief medical officer determines that the patient no longer requires treatment. O.C.G.A. Chap. 37-3 (1995 & Supp. 1998). The Code also provides for voluntary hospital treatment when a mentally ill person is suitable for treatment, as well as for voluntary and involuntary outpatient treatment as a means of avoiding inpatient care. *Id.* In 1993, the General Assembly restructured the entire system for delivering mental health care by transferring most of the control over treatment and funding from the statewide mental health agency, which operates the State's mental

hospitals, to regional and community boards, which operate or contract for community services. O.C.G.A. Chap. 37-2 (1995).

Georgia's experience with deinstitutionalization of mental health care parallels the national experience. Between 1955 and 1984, Georgia had a 66 percent decrease in the number of hospitalized mental patients. TORREY (1988), *supra*, at 219. And between 1955 and 1994, Georgia had an actual hospitalization decrease of 72.3 percent and an effective decrease (with population growth) of 85.7 percent. TORREY (1997), *supra*, at 207.

C. Facts

When the present case began, both L.C. and E.W. were patients in the 60-bed Treatment Unit of Georgia Regional Hospital-Atlanta (GRH-A), one of seven regional hospitals currently operated by the State. Joint Appendix (J.A.) 2, 13, 61, 66.

Their histories and their conditions then were similar in most relevant aspects. Both of them had been admitted to GRH-A many times over the years due to difficulties associated with their illnesses, including on some occasions aggressive acts toward others. J.A. 14, 63, 97, 99, 106, 107. Both of them were mentally ill as well as mentally retarded. L.C. was diagnosed as having schizophrenia, undifferentiated type, chronic, and mild retardation (J.A. 105), while E.W. was found to have a borderline personality disorder and mild retardation. J.A. 107-08.

L.C. was admitted in May 1991 after exhibiting aggressive and psychotic behavior toward a staff member at the residential community placement where she had lived for approximately a year. J.A. 14. E.W. was admitted involuntarily in December 1994 when she appeared to be hallucinating, paranoid, and too "loose" to care for herself. J.A. 107.

At GRH-A, treatment was provided to both plaintiffs by Dr. Dilipkumar Patel (a Board-certified psychiatrist) and a multidisciplinary treatment team, following an individualized service plan outlining the goals and methods of treatment. J.A. 15, 105, 108. In early 1993, GRH-A staff members began to work on obtaining a community placement for L.C. J.A. 15.

In February 1994, L.C.'s social worker noted that community placement was difficult, because significant funding would be needed to maintain her in the community. R59 (Plaintiffs' Statement of Material Facts), ¶157 (references to the district court record docket entries are denoted as (R#)).

L.C. began to attend a community day program in August of that year. J.A. 19. The treatment team arranged for L.C. to live with her mother on a trial basis, beginning in May 1995. J.A. 106. Problems arose during the trial visit, and the parties in the present suit entered into a consent order for L.C. to be evaluated and treated at a State residential retardation center. J.A. 75. After several months there, L.C. was placed, with public funds, in a residential community placement with additional support services, and she has remained there since. *See* Pet. 2a n.2.

E.W.'s course of treatment was more problematic, due to the variability of her illness, her behaviors, and her medical condition. On three occasions she stabilized, and the treatment team arranged trial visits to community placements as a transition to discharge. J.A. 108. On each occasion she was returned to GRH-A due to aggressive conduct or threats toward herself or others, among other reasons. *Id.*

In March 1995, Dr. Patel consulted about E.W.'s treatment with four persons with extensive experience in treating persons with mental retardation. R.A. 109-12. They all concluded that E.W. was a very challenging patient and agreed with Dr. Patel that her personality disorder, not the mental retardation component of her diagnosis, appeared to be the area requiring focused treatment. *Id.*

E.W.'s mental condition and her behavior improved slowly and she became more compliant with treatment. *Id.* In March 1996, however, mental retardation specialists with the Fulton County Regional Board (which is responsible for making E.W.'s placement assessments) concluded that E.W. should not be placed in the community at that time. J.A. 117. While the motions for summary judgment were pending, the Fulton County Regional Board did not have any uncommitted Medicaid waiver funding or State funds available to provide community residential mental retardation services to E.W. J.A. 116. These funds were being used to provide services for other disabled persons. *Id.* The director of State mental health services noted subsequently that the State had no such funds available either. J.A. 135-38. He affirmed that the State "cannot comply with its duty to provide adequate

facility [i.e., institution] programs if it moves any more of its facility funds to community programs." J.A. 137.

In November 1996, E.W. was transferred to the Medical Surgical Center of Central State Hospital in Milledgeville, Georgia, for monitoring and treatment of serious kidney problems. *See* J.A. 142, 155. While a patient there, she underwent surgery at an Atlanta hospital and then returned to Central State to receive aftercare and psychiatric treatment. *Id.* She was then transferred to a skilled-nursing-care unit at Central State, where she remained at the time of the district court's judgment in this case. By the time of the decision by the court of appeals, E.W. had also been discharged to a community placement due to her improved physical and mental condition and to additional funds becoming available. Pet. 2a n.2.

D. Proceedings Below

In filing this lawsuit, plaintiffs sought a declaration that their continued stay at GRH-A violated the Fourteenth Amendment and the ADA, and did so under 42 U.S.C. § 1983 (1994 & Supp. II 1996). J.A. 4, 62-63. They also demanded an injunction providing publicly financed community placements and services for themselves immediately. They did not seek damages of any type. *Id.* They claimed that they no longer required *inpatient care*, while conceding that they remained mentally disabled and in need of substantial care of some type, and that the continuation of their hospitalization established that they were not receiving minimally adequate care. J.A. 2-4, 61-63.

On cross-motions for summary judgment, the district court granted the plaintiffs' motion on the ADA claim and ordered the State to provide treatment in a less restrictive setting and to place them immediately in "appropriate" residential community settings with all "appropriate" services. Pet. 39a; *see* R91-2 n.1 (order denying stay). In the district court's view, "under the ADA, unnecessary institutional segregation of the disabled constitutes discrimination *per se*, which cannot be justified by a lack of funding." Pet. 37a. The district court did not rule on the constitutional claim. Pet. 40a.

The court of appeals affirmed. "By definition," it concluded, "where, as here, the State confines an individual with a disability in an institutionalized setting when a community placement is appropriate, the State has violated the core principle underlying the ADA's integration mandate." Pet. 8a.

The court then declared that under the ADA lack of funds was not a defense except "in the most limited of circumstances." Pet. 20a. It held that "[u]nless the State can prove that requiring it to make these additional expenditures [for the plaintiffs' two community placements] would be so unreasonable given the demands of the State's mental health budget that it would fundamentally alter the service it provides, the ADA requires the State to make these additional expenditures." Pet. 29a. The court of appeals remanded the case for consideration of this issue.

SUMMARY OF ARGUMENT

1. Title IIA of the Americans with Disabilities Act does not impose a "least restrictive treatment" requirement on the States when they provide psychiatric care to their citizens. By its terms, the statute protects only "qualified individual[s] with a disability" from (1) being "excluded from participation in or be[ing] denied the benefits of the services, programs, or activities of a public entity" because of their disability, or (2) being "subjected to discrimination" because of their disability. 42 U.S.C. § 12132 (1994). Neither theory of liability covers the complex medical, social and fiscal policies that go into a State's decision to provide or deny a community-care program. And neither theory makes a national value judgment that the "least restrictive treatment" must be provided to psychiatric patients, to say nothing of imposing on the States the massive and indeterminate fiscal burdens that would follow such a decision. Every pertinent rule of statutory interpretation undermines the Eleventh Circuit's conclusion to the contrary.

a. At least two textual flaws plague a "least restrictive treatment" construction of the ADA. As to the first theory of liability, plaintiffs were not denied a benefit – here, a community placement – by reason of their disability. At the few times that "all the experts agreed" (if, indeed, they ever did) that plaintiffs could be appropriately treated in the community, there was no funding to do so, and plaintiffs had to wait for a community placement for that reason, not because of their disability. As to the second theory of liability, discrimination generally requires a showing of uneven treatment as between similarly situated individuals. In this case, no class of

similarly situated individuals was even identified, let alone shown to be given preferential treatment.

b. Prior judicial constructions of the language of Title IIA of the ADA, as enacted in 1990, confirm this interpretation. Title IIA mirrors in all pertinent respects the language of § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U.S.C. § 794 (1994), which has never affirmatively imposed a "least restrictive treatment" mandate on the States' treatment of the disabled. The provision addresses primarily "evenhanded treatment" between the handicapped and non-handicapped, not evenhanded treatment between different categories of handicapped individuals. *Traynor v. Turnage*, 485 U.S. 535, 548 (1988); see *Alexander v. Choate*, 469 U.S. 287, 304 (1985). "There is nothing in the Rehabilitation Act," the Court has confirmed, requiring "that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." *Traynor*, 485 U.S. at 549. Prior to the passage of the ADA in 1990 (and indeed, prior even to 1995), the lower courts all followed this unwavering view as well.

c. It is inappropriate to credit Congress with imposing a "least restrictive treatment" requirement on the States through the ADA for another reason as well. Congress has shown its ability to enact related mandates through specific language, and yet it did not use that language here. In the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§ 6000 *et seq.* (1976 & Supp. III 1979) (now the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000 *et seq.* (1994 & Supp. II 1996)), Congress specifically used "least restrictive treatment" language, albeit

in a preferential, not mandatory, setting. Elsewhere, in the Individuals with Disability Education Act, 20 U.S.C. §§ 1400 *et seq.* (1994 & Supp. II 1996), Congress has imposed a similar "appropriate" education requirement. Likewise, the Medicaid laws, 42 U.S.C. §§ 1396 *et seq.* (1994 & Supp. II 1996), regulate in excruciating detail the States' provision of psychiatric care and yet they provide only limited funding for community treatment. There is no indication that the general terms of the ADA were designed to displace the specific requirements of this extensive regulatory scheme.

d. Nor do the general terms of the ADA overcome the "unmistakably clear" hurdle that the Court has established for litigants who seek an interpretation of a statute that will "alter the 'usual constitutional balance between the States and the Federal Government,' " *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)), or that will impose an "enormous financial burden" and "massive obligation" on the States, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981). Surely a sudden decision to require all States to provide the "least restrictive treatment" to their citizens in State hospitals would brush up against the boundaries of section five power under the Fourteenth Amendment, if not surpass them, while at the same time imposing substantial and largely indeterminate new financial obligations on the States.

2. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), rejected a similar effort to alter the States' provision of mental disability care to their citizens under the Developmentally Disabled Assistance and Bill of Rights Act of 1975. There, too, several institutionalized

patients claimed a right to receive care in "community living arrangements." 451 U.S. at 6. And there, too, they claimed that federal law gave them this right because it imposed a "least restrictive" treatment requirement on the States' provision of mental disability care. *Id.* at 7, 10. Even though the *Pennhurst* statute said that patients had "a right to appropriate treatment," and that this treatment "should be provided in the setting that is least restrictive of the person's personal liberty," 42 U.S.C. § 6010(1), -(2) (1976 & Supp. III 1979), the Court rejected the argument. It found insufficient evidence of an "unmistakably clear" intent on Congress's part to impose any such obligation on the States. Instead, it concluded that the law merely established a congressional preference, not requirement, that States provide care in this manner. 451 U.S. at 15-27. The same conclusion applies with equal if not greater force here since the ADA does not even use the explicit "least restrictive" treatment language found not to suffice in *Pennhurst*.

3. Nor can plaintiffs sidestep this conclusion by relying on an executive-branch regulation promulgated by the Department of Justice. The administrative regulation says that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (1998). No cognizable principle of administrative deference, however, permits enforcement of this regulation in a way that requires States suddenly to provide mental health care in the "least restrictive" environment. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Prior interpretations of the language that became the

ADA (as well as prior interpretations of this same regulation under § 504 of the Rehabilitation Act) made clear that it *did not* generally cover requests for evenhanded treatment in benefits as among different categories of handicapped individuals. *Traynor, supra*. But even if there were doubt on this score, no relevant precedent allows Congress to alter profound State-Federal allocations of responsibility under the radar of the clear-statement rule, but instead silently to delegate to executive-branch agencies the fundamental decision whether, when and how to alter the constitutional balance between the States and the Federal Government. Such an approach would prevent Congress from being held accountable for these decisions and would limit the States' ability to influence them. Cf. *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985).

ARGUMENT

In concluding that the State of Georgia violated federal law through its treatment of mentally disabled patients in State hospitals, the Eleventh Circuit did not rely on any of a number of traditional theories that bar improper treatment of the disabled. No one has alleged that any improper motive lay behind Georgia's laws. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). There thus is no allegation, let alone a finding, that the State's system of caring for mentally disabled individuals in hospitals has been motivated in any way by discriminatory animus toward the disabled. Nor is this a disparate-impact case. Cf. *Alexander v. Choate*, 469 U.S. 287 (1985) (limiting the availability of this theory under

§ 504 of the Rehabilitation Act). Plaintiffs thus have not shown – as indeed they could not show – that Georgia's efforts to provide care for the mentally disabled have had a disparate impact upon them. A program designed solely to benefit the disabled necessarily will solely impact the disabled, but it does not by that reason create a cognizable claim of discrimination. Plaintiffs are not here because they were ignored, but because the State proceeded to provide care for them.

As to the institutional care itself, moreover, plaintiffs do not allege that their initial involuntary confinement violated any constitutional requirements. See *Zinermon v. Burch*, 494 U.S. 113 (1990). Nor has there been any finding that the treatment actually provided at the institution fell below constitutional standards. See *Youngberg v. Romeo*, 457 U.S. 307 (1982).

Similarly, this is not a case about lack of reasonable accommodation in the employment setting. Plaintiffs are not seeking, and have not sought, employment that the State has denied them or failed to accommodate. Nor is this a case about the denial of a free appropriate education for disabled individuals. 20 U.S.C. §§ 1400 *et seq.* (1994 & Supp. II 1996). Lastly, this is not a case about failure to comply with the intricate, detailed requirements of the Medicaid laws, 42 U.S.C. §§ 1396 *et seq.* (1994 & Supp. II 1996), including extensive provisions regarding care for the disabled. Neither the federal government in general nor the Health Care Financing Administration ("HCFA") in particular has registered any complaint about Georgia's care for the disabled in this case.

Instead, the Eleventh Circuit concluded that the general terms of the Americans with Disabilities Act require Georgia, and presumably all other States as well, affirmatively to provide the least restrictive care for hospitalized mental-health patients and therefore to place them in the community whenever such treatment would be "appropriate." But this novel theory has no statutory or precedential pedigree. Neither the specific terms of the ADA, the general policy underlying the law nor the history of legislation behind it require wholesale outplacement of mental-health patients. And the Medicaid laws, which specifically regulate this area, positively permit what Georgia has done. In the final analysis, the important nationwide debate about the merits of institutionalization versus deinstitutionalization simply was not decided suddenly and quietly through the general terms of the ADA.

I. CUSTOMARY RULES OF STATUTORY INTERPRETATION UNDERMINE THE ELEVENTH CIRCUIT'S NOVEL CONSTRUCTION OF THE ADA.

A. THE PLAIN LANGUAGE OF THE ADA DOES NOT SUPPORT THIS THEORY.

The language of the ADA does not support the Eleventh Circuit's analysis. In plain terms, Title IIA provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, *by reason of such disability*, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (1994) (emphasis added).

This provision sets forth two liability benchmarks with respect to a State's treatment of "qualified individuals" with a disability. A State may not (1) deny such individuals a benefit, program, or activity by reason of the disability, or (2) discriminate against such individuals on the basis of their disability. Neither theory of liability applies here.

Plaintiffs were not denied any benefits or services because of their disabilities. Georgia's denial of care in these cases and in the general run of cases occurs in spite of a person's disability, not because of it. In Georgia, as in most States, community placements may be denied due to insufficient space in the program, insufficient federal or state resources, or safety concerns. That is not to say the ADA could never apply here. If the State denied a community placement to a mentally disabled individual because she was blind, for example, that could amount to the denial of a benefit based on a disability. Yet there has been no showing that the State has denied these services because of anyone's disability. Nor could there be on this record.

To the extent the Eleventh Circuit meant to conclude that community care may not be denied due to the seriousness of a mental disability, that analysis overlooks the requirement that an individual must be "qualified" for the benefit. It also leads to results that are administratively awkward and positively at odds with the beneficial goals of the ADA. This interpretation would lead to a regime in which the more serious the psychiatric condition, the more sound the basis for a claim under the ADA. That approach of course gets an exceedingly complex medical and police-power judgment – whether to release

an individual into the community – exactly backwards. The States ought to have more flexibility, not less, when it comes to institutionalizing patients who have the most serious of disabilities. The Eleventh Circuit's construction has another perverse consequence as well. It penalizes States for offering community, home, or intermediate care in the first instance because it provides one more option of "least restrictive treatment" to demand, and for like reasons it will forever discourage States from setting up psychiatric-care programs with limited enrollment because they will potentially violate the ADA by not offering the benefit to everyone at the outset. Congress deserves more credit than to have compelled either counterproductive result.

Nor can Plaintiffs show that the State *discriminated* against them because of their disability. Again, there was no such finding. In the ordinary sense of the word, "discrimination" necessarily requires uneven treatment of similarly situated individuals. *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 905 (1989); *Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (Brennan, J., concurring). In this case, no class of similarly situated individuals was even identified, let alone shown to be given preferential treatment. In the end, nothing about the text of the ADA imposes an affirmative "integration" or "least restrictive environment" requirement on the States.

B. JUDICIAL INTERPRETATIONS OF § 504 PRIOR TO THE PASSAGE OF TITLE IIA OF THE ADA DO NOT SUPPORT THIS THEORY.

Context and history confirm this reading of the statute. Section 504 of the Rehabilitation Act of 1973 never imposed an integration mandate on the States, predates the passage of Title IIA of the ADA in 1990, and uses language that, in all respects pertinent to this dispute, is identical to it:

> *§ 504 of the Rehabilitation Act*: No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . 29 U.S.C. § 794 (1994).
>
> *§ 12132 of the ADA*: Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132 (1994).

Because the two provisions are identical in nature, judicial constructions of the former (§ 504) inform judicial constructions of the latter (ADA). "When administrative and judicial interpretations have settled the meaning of a statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. ___, 118 S.Ct. 2196,

2208 (1998). As *Bragdon* makes clear, settled interpretations of the Rehabilitation Act inform construction of parallel sections of the ADA.

1. As Applied to the States, § 504 Assured That Handicapped Individuals Receive Evenhanded Treatment in Relation to Non-Handicapped Individuals.

In construing § 504 prior to 1990, the Court uniformly recognized that its central purpose was to assure that handicapped individuals receive "evenhanded treatment" with respect to those who are not handicapped. *Traynor v. Turnage*, 485 U.S. 535, 548 (1988); *Alexander v. Choate*, 469 U.S. 287, 304 (1985) ("Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance."); *id.* at 303 (Section 504 does "not guarantee that each recipient will receive that level of health care precisely tailored to his or her needs."). Notably, application of § 504 to allegations of discrimination among benefits provided to classes of handicapped persons was specifically limited. "There is nothing in the Rehabilitation Act," the Court confirmed, "that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." *Traynor*, 485 U.S. at 549 (upholding a Veterans' Administration regulation that excluded "primary alcoholics" from a benefit that was extended to persons disabled by alcoholism related to a mental disorder). This reading of § 504 thus allows the States to provide special services to developmentally disabled individuals, for example, without being required

to provide those same services to all individuals suffering from schizophrenia. Otherwise, § 504 would penalize the entity for providing the benefit and would potentially discourage the provision of disability benefits in the first instance.

Case law also rejected attempts to create broad affirmative obligations under § 504. In *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979), for example, the Court concluded that "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." Even when affirmative obligations were created, it was only because § 504 "require[d] that an otherwise qualified handicapped individual must be provided with meaningful *access* to the benefit that the grantee offers." *Alexander v. Choate, supra,* at 469 U.S. at 301 (emphasis added). The justification of access to State benefits is not present here.

The Court further concluded that § 504 did not encroach on the States' decisions about the types of disability services they provided under the Medicaid Act. In *Alexander v. Choate*, the Court considered whether Tennessee's proposed reduction in Medicaid coverage (a reduction in the number of annual days of inpatient hospital care) violated § 504 due to its disparate impact on the disabled. The Court held that it did not, stating:

> In enacting the Rehabilitation Act and in subsequent amendments, Congress did focus on several substantive areas – employment, education, and the elimination of physical barriers to access – in which it considered the societal and personal costs of refusals to provide meaningful access to the handicapped to be particularly high. *But nothing in the pre- or post-1973 legislative discussion of § 504 suggests that Congress desired to make major inroads on the States' long-standing discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid. . . .*

469 U.S. at 306-07 (citations and footnotes omitted) (emphasis added).

Nor, for similar reasons, were the anti-discrimination requirements of § 504 concerned with "adequate and appropriate psychiatric care or safe and humane living conditions for persons institutionalized because of handicap. . . . " *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 640-41 (1986) (plurality opinion). The provision was never intended to allow intervention by federal agencies into treatment decisions traditionally left by State law to parents, physicians, and state agencies. *Id.* at 645. See *id.* at 672 ("nothing in § 504 authorizes [the secretary] to commandeer state agencies . . . [these] agencies are not field offices of the HHS bureaucracy and they cannot be conscripted against their will as foot soldiers in a federal crusade.") In short, § 504 had long been construed to be an anti-discrimination statute, not a national health care statute.

2. Lower Court Interpretations of § 504 Rejected an Integration Requirement for the States' Mental Institutions.

Prior to the 1990 passage of Title IIA of the ADA, many lower courts were invited to adopt an affirmative integration or "least restrictive treatment" requirement

under § 504. None did. They specifically found that nothing in § 504 required the States to provide mental disability treatment in a community placement simply because it was possible, appropriate, or even better than institutional treatment. Circuit courts: *P.C. v. McLaughlin*, 913 F.2d 1033 (2d Cir. 1990); *Clark v. Cohen*, 794 F.2d 79 (3d Cir.), *cert. denied*, 479 U.S. 962 (1986) (later limited in *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir.), *cert. denied*, 516 U.S. 813 (1995)); *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983). District courts: *People First of Tennessee v. Arlington Developmental Ctr.*, 878 F.Supp. 97 (1992), *aff'd at* 1998 U.S. App. LEXIS 9537 (unpublished), *cert. denied*, 142 L.Ed.2d 423 (1998); *Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F.Supp. 1243 (D.N.M. 1990), *rev'd in part on other grounds*, 964 F.2d 980 (10th Cir. 1992); *S.H. v. Edwards*, No. C81-877A (N.D.Ga. 1987) (reprinted at 860 F.2d 1046-1053), *aff'd*, 860 F.2d 1045 (11th Cir. 1988), *reh'g en banc denied*, 866 F.2d 1420 (11th Cir. 1989), *cert. denied*, 491 U.S. 905 (1989), *reh'g en banc granted and panel opinion vacated*, 880 F.2d 1203 (11th Cir. 1989), *aff'd apparently on other grounds*, 886 F.2d 292 (11th Cir. 1989) (distinguished by panel in present case, Pet. 19a).

It was not until 1995 that the first court of appeals followed an "integration mandate" approach to disability services. *Helen L. v. Didario*, 46 F.3d 325 (3d Cir. 1995). Cf. *Halderman v. Pennhurst State Sch. & Hosp.*, 784 F.Supp. 215, 224 (E.D.Pa.), *aff'd*, 977 F.2d 568 (3d Cir. 1992).

C. EVEN THE ADMINISTRATIVE INTERPRETATIONS UNDER § 504 DID NOT CONSIDER "INTEGRATION" IN THE CONTEXT OF DEINSTITUTIONALIZATION OR LEAST RESTRICTIVE TREATMENT.

Nor can plaintiffs show that the administrative regulations under § 504 required deinstitutionalization or "least restrictive treatment" prior to 1990. Three key events inform the regulatory history at issue here. First, in 1978, the Department of Health, Education and Welfare ("HEW") issued regulations and interpretive materials to coordinate federal agency enforcement of § 504. 45 C.F.R. Part 85, 43 Fed. Reg. 2132, 1-13-78 (*see* App. A, 1a). Second, in 1980, the coordination function was transferred to the Department of Justice ("DOJ"), and the next year DOJ redesignated HEW's coordination regulations, without change, as its own. 28 C.F.R. Part 41, 43 Fed. Reg. 40686, 8-11-81 (*see* App. B, 6a). Third, a year after the ADA was adopted (*see* App. C, 7a, for Title IIA), DOJ issued its own coordination regulations. 28 C.F.R. Part 35 (1991) (*see* App. D, 10a).

The § 504 regulations issued by HEW primarily addressed treatment of the handicapped relative to the non-handicapped. One, however, specifically addressed federally funded disability services, and affirmatively permitted the States to provide benefits to members of one class of handicapped individuals but not to another:

> The exclusion of nonhandicapped persons from the benefits of a program limited by federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by

> federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

45 C.F.R. § 85.51(c) (1978) (*see* App. A, 4a).

Another regulation, 45 C.F.R. § 85.51(d), required "integrated" programs where appropriate. This regulation hews closely to the regulation on which the Eleventh Circuit relied:

> *HEW's regulation under § 504*: Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons. 45 C.F.R. § 85.51(d) (1978) (*see* App. A, 4a).
>
> *DOJ's regulation under the ADA*: A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 28 C.F.R. § 35.130(d) (1991) (*see* App. D, 13a).

Still, no interpretation of 45 C.F.R. § 85.51(d) prior to 1990 did what the Eleventh Circuit has tried to do here. The requirement of "integrated" programs was never considered in the context of disability services for the mentally ill, but it was specifically discussed in the context of providing "equal opportunity" for handicapped persons to participate in federally assisted programs for the nonhandicapped. (43 Fed. Reg. 2132, 2134, 1-13-78) (*See* App. A, 5a). There was no hint that the integration regulation was intended to cover institutionalization or in any way affect the pace with which States provided community care. Not surprisingly, the regulation was not relied on or even discussed by the lower courts that

considered § 504 claims brought by institutionalized patients seeking treatment in the "least restrictive environment." *See* cases cited at pp. 26-27, *supra*.

D. TITLE IIA OF THE ADA WAS A LIMITED EXTENSION OF § 504 THAT DID NOT ALTER PRIOR LAW COVERING STATE CARE FOR THE MENTALLY DISABLED.

In adopting the ADA, Congress significantly expanded the provisions of the Rehabilitation Act regarding employment (Title I), public transportation (Title IIB), and public accommodations and services operated by private entities (Title III). By contrast, the changes to § 504 of the Rehabilitation Act, regarding public services and found in Title IIA, were minor. *See* comparison of texts at pp. 22-23, *supra*. The primary objective of the change was to extend the reach of the provision to public entities that do not receive federal funds. That change is not relevant here. The other noticeable change was to delete the word "solely" so that it no longer modifies "by reason of." But that modification, to the extent that it did anything at all, was designed simply to avoid unanticipated results. H.R. Rep. 101-485(II), *84, 1990 U.S.C.C.A.N. 303.

There is no suggestion in these changes that Congress intended to make the broad policy changes discovered by the Eleventh Circuit. Had Congress intended the ADA significantly to alter the States' mental health care systems, surely it would not have parroted the language of § 504. Still less would it have entered the complex medical, sociological and fiscal debate about the pace and

extent of deinstitutionalization of mental health care without saying a word about the issue and without providing funding for the costs associated with such a change.

The reverberating silence of the legislative history, statement of purpose and, above all, statutory text concerning an unyielding preference for one type of mental health care over another makes plaintiffs' theory implausible. The 1990 passage of the ADA simply did not suddenly make a national value judgment in this area that all States are compelled to follow.

E. THE GENERAL LANGUAGE OF TITLE IIA DOES NOT IMPLICITLY REPEAL OR DISPLACE THE VASTLY MORE SPECIFIC AND COMPLEX PROVISIONS OF THE MEDICAID ACT.

Besides failing to change existing understandings of the meaning of § 504, the general terms of Title IIA of the ADA do not displace the detailed regulations established for psychiatric care by the Medicaid laws. "[W]here there is no clear intention otherwise," the Court has reminded litigants, "a specific statute will not be controlled or nullified by a general one." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)). Here, however, the Eleventh Circuit's interpretation of the ADA effectively displaces the excruciatingly detailed requirements of the Medicaid laws.

At the time the ADA was adopted, Medicaid funded various institutional services for the disabled. These

included nursing facility services (42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(A) (1988 & Supp. II 1990)), intermediate care facilities for the mentally retarded ("ICF/MRs") (42 U.S.C. § 1396d(a)(15) (1988)), various institutional services for the mentally ill, including inpatient psychiatric hospital services for individuals under age 21 or over age 65 (42 U.S.C. § 1396d(a)(14),-(16) (1988)), and certain institutional services for persons whose primary diagnosis is mental retardation (42 U.S.C. § 1396d(a)(1), -(4)(A), -(15) (1988 & Supp. II 1990)); 42 C.F.R. § 441.302(d)(1)-(2) (1996). See also *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998) (finding that the State must provide services in their *facilities* (ICF/MRs or ICF/DDs) to eligible individuals with reasonable promptness under the Medicaid Act).

Medicaid also provided funding for home and community-based care, instead of facility-based care, through its waiver programs, which the States must receive permission to offer. 42 U.S.C. § 1396n(c)(1) (1988 & Supp. II 1990). The States' discretion to choose the proper mix of Medicaid services, the Court has unanimously held, was not limited by § 504. *Alexander v. Choate, supra*, 469 U.S. at 302-09.

The Medicaid statute and regulations were (and still are) extremely detailed, comprehensive, and complex. They reflected a congressional policy preference for treatment in the institution over treatment in the community, and have only gradually permitted reimbursement for community care on an incremental basis. Far from *requiring* the States to provide treatment in "the most integrated setting appropriate," they actually required that disabled individuals *not* receive community care if they

preferred institutional care. 42 U.S.C. § 1396n(c)(2)(C) (1988). The relatively brief and general language of Title IIA cannot be read to repeal by implication these existing policies in general or the Medicaid laws and regulations in particular. *Choate*, 469 U.S. at 303.

Confirming this interpretation is the fact that Congress considered – and rejected – legislation that would have imposed an obligation on the States to provide community care at the same time that it was debating the ADA. *Compare* 135 Cong. Rec. S8518 (daily ed. May 9, 1989); 135 Cong. Rec. S19879 (daily ed. Sept. 7, 1989); 135 Cong. Rec. S1972 (daily ed. Feb. 8, 1989); *id.* at S1973; S. 384, 101st Cong. § 4 and § 6 (1989) *with* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4712, 1990 U.S.C.C.A.N. 104 Stat. 1388-187. Congress's considered decision to reject that proposal carries great weight. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983).

F. THE TEXT OF THE ADA DOES NOT PROVIDE THE CLEAR STATEMENT NECESSARY FOR CONGRESS TO SEIZE SUCH WIDE-RANGING, UNPREDICTABLE AND LIMITLESS CONTROL OVER A CORE AREA OF STATE AND LOCAL GOVERNMENT.

Even if there were ambiguity regarding Congress's intentions in passing the ADA, plaintiffs' claims still must be rejected. In order to impose this kind of indeterminate and costly mandate on the States and to displace the States' traditional authority in this area, Congress must do so clearly. It has not.

As the Court has held:

> "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); see also *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984)."

Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)). See also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (there must be a " 'clear and manifest' showing of congressional intent to supplant traditional state police powers"). There can be little doubt that a "least restrictive treatment" interpretation would alter (if not violate) the traditional constitutional balance between the States and the Federal Government and would displace the States' traditional authority in this area. And, if nothing else, the ADA, and its regulations as well, are at least ambiguous on whether a "least restrictive treatment" principle should govern services that are provided only to the disabled.

II. THE COURT HAS APPLIED THESE PRINCIPLES BEFORE AND REJECTED A SIMILAR ARGUMENT IN *PENNHURST*.

In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), the Court applied these principles in rejecting a similar effort to alter the manner in which the States provide mental disability care to their citizens. There, as here, several patients at a State institution filed a claim to receive care in "community living arrangements." 451 U.S. at 8. There, as here, they claimed a

federal statute supported their claim – in *Pennhurst*, it was the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (the "DDA"), 42 U.S.C. §§ 6000 *et seq.* (1976 & Supp. III 1979); here, it is the Americans with Disabilities Act. There, as here, the patients claimed the statute required States to provide care in the "least restrictive" environment. *Id.* at 10. And there, as here, the Court required "unmistakably clear" language establishing such a mandate before it would be willing to impose this fundamental change in the historical allocation of responsibility for psychiatric care between the State and Federal Governments. *Id.* at 24.

What differences there are between the two cases merely cement the conclusion that if it was inappropriate to impose a "least restrictive" treatment requirement under the DDA, it is doubly inappropriate to do so under the ADA. In *Pennhurst*, it could at least be claimed that there was statutory language on point, which in fact suggested that Congress meant to impose an affirmative obligation on the States in this area. After all, the DDA said that patients had "a right to appropriate treatment," which "should be provided in the setting that is least restrictive of the person's personal liberty." 42 U.S.C. § 6010(1), -(2) (1976 & Supp. III 1979). Still, the Court found insufficient clarity to grant the relief. It was not clear, the Court concluded, whether these parts of the statute meant to condition the receipt of federal money on the States' compliance with this requirement or whether the provisions merely stated a federal preference for community care rather than an obligation. 451 U.S. at 12-14. Surely if ambiguity existed in the DDA over the requirement of community care, it necessarily exists here

where there is not a word about a requirement of "least restrictive" care.

The second distinction between the *Pennhurst* statute and the ADA is again one that cuts against rather than in favor of plaintiffs' claim. The DDA, it is true, was enacted under Congress's spending powers. And *Pennhurst*, it is also true, concluded that Spending Clause legislation is in the nature of a Federal-State contract, requiring Congress clearly to spell out State obligations that come with accepting federal money under such programs.

But the same explanations for requiring "unmistakably clear" language in the one setting apply with equal, if not more, force in the other. Whether treated as section five legislation under the Fourteenth Amendment or Commerce Clause legislation under Article I, section 8, the ADA also imposes substantial, largely "indeterminate" obligations on the States, *Pennhurst*, 451 U.S. at 24, and does so in a setting that alters the constitutional balance between the States and Federal Government, see *Gregory v. Ashcroft*, 501 U.S. at 460-61. That Congress did so in the ADA *without providing any federal funding* does not help plaintiffs. If anything, it makes more serious the risk of allowing Congress silently to impose such massive fiscal responsibility on the States. Plainly, a clear statement rule applies in both settings. See *Gregory; Rice*. And just as Congress failed to provide the requisite "unmistakably clear" language in the DDA to require "least restrictive" treatment, so too it failed to provide the necessary clarity here.

III. THE ELEVENTH CIRCUIT'S OPINION RESTS NOT ON THE TEXT OF THE ADA, BUT ON VAGUE STATEMENTS OF CONGRESSIONAL FINDINGS AND PURPOSE AND OF LEGISLATIVE HISTORY, AND ON A REGULATION THAT, AS INTERPRETED, EXCEEDS EXECUTIVE BRANCH POWER.

A. THE ELEVENTH CIRCUIT MISREAD THE TEXT OF THE ADA.

The Eleventh Circuit's analysis does not overcome these problems. In response to the State's textual argument that plaintiffs failed to show they were discriminated against "by reason of their disability," the court merely noted that "the confinement of L.C. and E.W. at GRH-A is attributable to their disabilities, thereby proving the very element the State argues is missing." Pet. 5a. Not only does this interpretation ignore the other reasons the State has supplied for denying community care, but it would mean that all disability services are themselves discriminatory, as they are all "attributable to" disability. That belies common sense, is inconsistent with prior interpretations of § 504, and cannot be true. The Eleventh Circuit's interpretation of discrimination would lead to a regime in which the worse the disability and the greater the need for hospitalization, the stronger the case for discrimination. And, even as to hospitalized individuals who are denied community care when they are prepared for it, the denial by definition occurs in spite of disability, not because of it.

Nor was the Eleventh Circuit correct in concluding that the ADA's use of the word "institutionalization" supported this theory. Pet. 17a-18a. A reading of the cited

section *in context* shows that "institutionalization" is discrimination-neutral, just as "employment," "housing," "education," and "recreation," which are the other areas that the ADA's statement of purpose declared the statute would cover, are discrimination-neutral. 42 U.S.C. § 12101(a)(3) (1994). Cf. *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. ___, 118 S. Ct. 1952, 1955-56 (1998) (Court assumes that "institutionalization" may include penal institutions).

The court's repeated use of the word "confinement" to describe the plaintiffs' treatment also is exceedingly misleading. Georgia, like all States, involuntarily confines mentally ill persons only when they meet stringent statutory and constitutional standards requiring imminent risk to the patient or others due to mental illness. See *Parham v. J.R.*, 442 U.S. 584 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Benham v. Ledbetter*, 785 F.2d 1480 (11th Cir. 1986). Such confinement is not punitive, *Addington v. Texas*, 441 U.S. 418, 428 (1979), and, until now, it was not covered by the ADA. Georgia also provides voluntary treatment to mentally ill individuals pursuant to Georgia law. O.C.G.A. § 37-3-20 (1995). But a voluntary patient who does not meet the more stringent commitment standards is not "confined" by the State. Plaintiffs were initially brought to the hospital on an involuntary basis, and after being stabilized, transferred to a voluntary basis.

Nor does it change matters that the Eleventh Circuit remanded the case to determine whether its interpretation would "fundamentally alter" the services Georgia provides. The remand incorrectly assumes that there is discrimination against plaintiffs when there is not. It mistakenly asks the district court to examine this defense

based on the cost of providing community care to just two individuals, not all Georgia citizens who desire community care. It impermissibly fails to give deference to medical and administrative judgment, by restricting state officials from considering the legitimate and traditional factors they would normally weigh in making these decisions (including the patients' and family members' preferences, quality of care, cost, and availability) and substituting therefor an overreaching commitment to least restrictive treatment. *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Parham v. J.R.*, 442 U.S. 584 (1979); *Jackson v. Fort Stanton Hosp. & Training Sch.*, 964 F.2d 980 (10th Cir. 1992). Thus, it fails to recognize that a decision requiring the "least restrictive" treatment will always "fundamentally alter" Georgia's provision of mental health services.

B. THE LEGISLATURE DID NOT ADDRESS DEINSTITUTIONALIZATION WHEN IT ADOPTED THE ADA.

The Eleventh Circuit's opinion also relies heavily on vague statements of Congressional findings and purposes, as well as legislative history. These statements all use the words "segregation" and "integration." Yet the court did not – and cannot – point to any such statement in the context of deinstitutionalization. The issue of deinstitutionalization, like "the dog that did not bark," simply was not before Congress, was not raised by Congress, and was not debated by Congress during the adoption of the ADA. See *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991).

Further, the House Education and Labor Committee Report on the ADA contradicts the Eleventh Circuit's analysis. It says that the ADA was not a departure from § 504: "The Committee intends that title II work in the same manner as § 504." H.R. Rep. 101-485(III), 101st Cong., 2d Sess. 1990, 1990 U.S.C.C.A.N. 445, 10990 WL 121680 (Leg. Hist.). Significantly,

> The Committee has chosen not to list all the types of actions that are included within the term "discrimination," as was done in titles I and III, because this title essentially simply extends the antidiscrimination prohibition embodied in section 504 to all actions of state and local governments. . . . Finally, it is the Committee's intent that section 202 also be interpreted consistent with *Alexander v. Choate*, 469 U.S. 287 (1985).

H.R. Rep. No. 101-485(II), 101st Sess. 84 (1990), 1990 U.S.C.C.A.N. 267. Based on this report, Congress did not intend any broad delegation to DOJ to venture into new policy arenas such as deinstitutionalization. Further, Congress specifically endorsed the precise limitations on § 504 expressed in *Alexander v. Choate*.

The Eleventh Circuit made much of the fact that Congress required the regulations under Title IIA to be consistent with the coordination regulations originally issued by HEW. Pet. 16a. Yet this unexceptional directive merely shows that Congress intended Title IIA to be interpreted consistently with § 504, not that Congress had parsed subtle distinctions between the various agencies' regulations and favored one over the other. Indeed, the Attorney General had been directed to determine which

of the various agency regulations were "inadequate, unclear or unnecessarily inconsistent" (Exec. Order 12250, § 1-202, 45 Red. Reg. 72995, 11-4-80), and had concluded that "[d]espite the large number" of agency regulations, there was "very little variation in their substantive requirements, or even in their language." 28 C.F.R. Part 35, Supp. Info. (56 Fed. Reg. 35694, 7-26-91). Certainly Congress did not intend to favor a substantive distinction in the agency regulations so subtle that even the Attorney General did not distinguish it. The Eleventh Circuit's contrary conclusion is wrong and unsupported.

C. THE ELEVENTH CIRCUIT GAVE IMPERMISSIBLE DEFERENCE TO THE ATTORNEY GENERAL'S INTERPRETATION OF THE INTEGRATION REGULATION.

1. The Attorney General's Position Is Not Based on a Permissible Interpretation of the ADA.

The Eleventh Circuit, as well as the District Court, relied heavily on the Attorney General's *amicus* brief construing the integration regulation. The Third Circuit's opinion in *Helen L.* also adopted this position, based in part on a similar brief. The agency's interpretation of the integration regulation, however, is not based on a permissible construction of the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Even when the Court accords the Attorney General's construction of an act deference, it does so only "if Congress has not expressed its intent with respect to the

question, and then only if the administrative interpretation is reasonable." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 483 (1997) (quoting *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508 (1992)) (rejecting the Attorney General's interpretation of the Voting Rights Act); *Miller v. Johnson*, 515 U.S. 900 (1995) (same). Nothing about *Chevron* gives an Executive Branch agency authority to replace the settled Article III interpretation of a statute with a construction of its own.

2. The Attorney General's Litigation Position Is Not Supported by Its Own Administrative Pronouncements.

Not only is the Attorney General's position a substantial departure from settled judicial and administrative interpretations of § 504, however. It also is a dramatic departure from the agency's *own* regulations after the ADA was adopted.

In 1991, the Attorney General issued its final rules, including substantially the same "integration" provision. 28 C.F.R. Part 35 (*see* App. D, 11a). The Attorney General recognized, at least at that time, that the terms "segregation" and "integration" should be interpreted in the context of allowing disabled persons access to programs provided for the non-disabled. *See* App. D, 16a-17a.

In discussing the integration provision, the Attorney General included examples of actions that would violate the integration provision: (1) requiring a disabled person to eat in the back of a government cafeteria, or (2) requiring a blind person to go on a special museum tour instead of permitting him to tour the exhibit at his own pace with

the recorded tour. *See* App. D, 18a-20a. Obviously, these illustrations have no application here and simply confirm the prior interpretation of the regulation. Other provisions of the regulations are inconsistent with DOJ's current litigation position as well. *See* 28 C.F.R. § 35.130(c) (1991), App. D, 13a.

The Department's Technical Assistance Manual, which includes a special section on the "integrated setting" requirement, sets out over fifty examples of Title IIA's application. Not one of them, however, relates to deinstitutionalization. See *The Americans With Disabilities Act, Title II Technical Assistance Manual, Covering State and Local Government Programs and Services*, 1993 edition.

The Attorney General's present litigation position in the end represents a stark and unexplained departure from prior interpretations of § 504 and the ADA. This departure was not justified by any re-examination of the complex issues or consideration of the competing policies at stake. *Chevron*, 467 U.S. at 857-58. The change appears to have occurred entirely outside the ongoing national debate on the issue. It is a mere "litigation position" and is without the usual justifications for deference to an agency's interpretation. *Gregory v. Ashcroft*, 501 U.S. 452, 485 n.3 (1991) (White, J., concurring in judgment). At any rate, DOJ is not an agency with expertise in mental health care, and its new position was not adopted pursuant to notice and comment under the Administrative Procedures Act. See *Paralyzed Veterans of America v. D. C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

3. The Attorney General's Position Raises Serious Constitutional Problems.

Statutory or regulatory interpretations that create constitutional doubt should be avoided. *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). The Eleventh Circuit's opinion raises serious doubt on at least two fronts.

First, the Eleventh Circuit found that any ambiguity in the statutory text about deinstitutionalization could be resolved by delegating broad, policy-making authority to the Attorney General. Pet. 6a-7a. This approach, of course, violates the clear-statement requirement of *Pennhurst* and *Gregory*. The Constitution does not permit Congress to delegate authority to the Executive Branch to decide when, where, and whether to divest the States of authority, and to do so in such an indeterminate and unguided way. Unlike the customary *Chevron* situation, Congress did not leave an explicit gap in the statute for interpretation by the Department of Justice. To the contrary, in its House Report Congress expressly limited Title IIA's definition of "discrimination" to its previous interpretations under § 504. See *supra*.

Such hidden appropriations of authority cannot be squared with one of the central justifications for allowing regulation of the States in the first instance. The principal explanation for *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) – that States protect their self-interest through representatives in Congress – is of no help here. The States have no representative in the Executive Branch, and at any rate had no opportunity to influence this re-interpretation of the regulations, since

no public hearings were held. If the States, in short, must be held accountable for exercising or declining to exercise their political muscle in the halls of Congress, then surely Congress must be precluded from seizing such power silently or, worse, leaving it to the whim of an executive branch where the States have no representation.

Nor may plaintiffs end-run the clear-statement requirement by arguing that Congress (and presumably the States) are aware that ambiguities in a statute will be resolved by the implementing agency. *Chevron*, 467 U.S. at 842-43. Such default rules do not trump the time-honored clear-statement rule, which requires statutory ambiguity to be construed in favor of preserving traditional State authority, not of displacing it.

A second area of constitutional doubt raised by the Eleventh Circuit's interpretation is whether the Attorney General's position exceeds Congressional authority under § 5 of the Fourteenth Amendment. *See* Pet. 12-16. See also *Kimel v. State of Florida Bd. of Regents*, 157 F.3d 908 (11th Cir. 1998), *cert. granted*, No. 98-791, 98-796 (Jan. 25, 1999) (limited to the ADEA), *cert. pending*, No. 98-829 (ADA); *Kilcullen v. New York State Dep't of Transp.*, 1999 U.S. Dist. LEXIS 438 (N.D.N.Y. 1999). In light of the lack of support for the Eleventh Circuit's interpretation in either the plain text of the statute, the settled interpretation of § 504, or the legislative history, these areas of constitutional doubt can and should be avoided.

CONCLUSION

For the foregoing reasons, the Eleventh Circuit's decision should be reversed.

Respectfully submitted,

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INDEX TO APPENDIX

APPENDIX A

COORDINATION REGULATIONS ISSUED BY THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

45 C.F.R. Part 85 (43 Fed. Reg. 2132, 1-13-78)

Implementation of Executive Order 11914, Nondiscrimination On The Basis Of Handicap In Federally Assisted Programs

[Final rule by Department of Health, Education and Welfare]

SUMMARY: This rule implements Executive Order 11914, "Nondiscrimination with Respect to the Handicapped In Federally Assisted Programs," under which the Department of Health, Education, and Welfare is required to coordinate government wide enforcement of section 504 of the Rehabilitation Act of 1973, as amended. In particular, the rule sets forth enforcement procedures, standards for determining which persons are handicapped, and guidelines for determining what practices are discriminatory. These procedures, standards, and guidelines are to be followed by each federal agency that provides federal financial assistance in issuing regulations implementing section 504.

• • •

SUBPART C – Guidelines for Determining Discriminatory Practices

GENERAL

§ 85.51 General prohibitions against discrimination.

(a) No qualified handicapped person, shall, on the basis of handicap, be excluded from participation in, be

denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

(b)(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or servi[illegible] to beneficiaries of the recipient's program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A recipient may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

(4) A recipient may not, in determining the site or location of a facility, make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives

of the program or activity with respect to handicapped persons.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

(d) Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

(e) Recipients shall take appropriate steps to ensure that communications with their applicants, employees, and beneficiaries are available to persons with impaired vision and hearing.

* * *

SUPPLEMENTARY INFORMATION

* * *

Subpart C of this regulation, sets forth guidelines for determining discriminatory practices; these are, in general, minimum requirements. Except where obvious discrepancies in implementation would result, other agencies may exceed these standards if they wish. The subpart is divided into three parts: General, based on § 84.4 of the HEW section 504 regulation; Employment, based on Subpart B of the HEW section 504 regulation, and Program Accessibility, based on Subpart C the HEW section 504 regulation. A more detailed discussion of

these subparts than is contained below may be found in Appendix A of the HEW regulation.

The general prohibitions against discrimination on the basis of handicap set forth in § 85.51 incorporate basic principles that the Department determined, in developing its own regulation, to be inherent in section 504. First, section 504, like other nondiscrimination statutes, prohibits not only those practices that are overtly discriminatory but also those that have the effect of discriminating. And it is equal opportunity, not merely equal treatment, that is essential to the elimination of discrimination on the basis of handicap. Thus, in some situations, identical treatment of handicapped and nonhandicapped persons is not only insufficient but is itself discriminatory. On the other hand, separate or different treatment can be permitted only where necessary to ensure equal opportunity and truly effective benefits and services. Federally assisted programs and activities must thus be provided in the most integrated setting appropriate to the needs of participating handicapped persons.

[Dated January 13, 1978. Joseph A. Califano, Jr., Secretary.]

APPENDIX B

REDESIGNATION AND TRANSFER OF § 504 GUIDELINES

28 C.F.R. Part 41, 45 C.F.R. Part 85 (43 Fed. Reg. 40686, 8-11-81)

[Final Rule by Department of Justice]

* * *

This rule is issued pursuant to section 1-303 of Executive Order 12250 which provides that in carrying out his functions under the Order the Attorney General shall issue such regulations "as he deems necessary". The rule will retitle the present guidelines at 45 C.F.R. Part 85, transfer them to 28 C.F.R. Part 41, and make necessary nomenclature changes.

Publication of this rule as a proposal for public comment is unnecessary since it is solely a redesignation of existing regulations.

* * *

APPENDIX C

TITLE IIA OF THE AMERICANS WITH DISABILITIES ACT OF 1990

42 U.S.C. §§ 12131-12134 (Supp. 1990)

SUBCHAPTER II-PUBLIC SERVICES

Part A-Prohibition Against Discrimination and Other Generally Applicable Provisions

§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means-

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of title 45).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial

assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

[Editorial notes, including cross-references, citations to statute, and effective date, omitted throughout]

APPENDIX D

COORDINATION REGULATIONS ISSUED BY THE DEPARTMENT OF JUSTICE

28 C.F.R. Part 35 (56 Fed. Reg. 35694, 7-26-91)

Nondiscrimination on the Basis of Disability in State and Local Government Services

[Final Rule By Department of Justice]

* * *

SUBPART B – GENERAL REQUIREMENTS

§ 35.130 General prohibitions against discrimination

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability –

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections-

(i) that have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the program or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting

appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

* * *

SUPPLEMENTARY INFORMATION

[56 Fed. Reg. 35694, 7-26-91]

The landmark Americans with Disabilities Act ("ADA" or "the Act"), enacted on July 26, 1990, provides

comprehensive civil rights protections to individuals with disabilities in the areas of employment, public accommodations, State and local government services, and telecommmunications.

This regulation implements subtitle A of title II of the ADA, which applies to State and local governments. Most programs and activities of State and local governments are recipients of Federal financial assistance from one or more Federal funding agencies, and therefore, are already covered by section 504 of the Rehabilitiation Act of 1973, as amended (29 U.S.C. 794) ("section 504"), which prohibits discrimination on the basis of handicap in federally assisted programs and activities. Because title II of the ADA essentially extends the nondiscrimination mandate of section 504 to those State and local governments that do not receive Federal financial assistance, this rule hews closely to the provisions of existing section 504 regulations. This approach is also based on section 204 of the ADA, which provides that the regulations issued by the Attorney General to implement title II shall be consistent with the ADA and with the Department of Health, Education and Welfare's coordination regulation, now codified at 28 C.F.R. part 41, and, with respect to "program accessibility, existing facilities," and "communications," with the Department of Justice's regulation for its federally conducted programs and activities, codified at 28 C.F.R. part 39.

* * *

SECTION BY SECTION ANALYSIS

[now printed at 28 C.F.R. Part 35, Appendix A]

[emphasis added]

* * *

Paragraph (a) [of § 35.130] restates the nondiscrimination mandate of section 202 of the ADA. The remaining paragraphs in § 35.130 establish the general principles for analyzing whether any particular action of the public entity violates this mandate.

Paragraph (b) prohibits overt denials of equal treatment of individuals with disabilities. A public entity may not refuse to provide an individual with a disability with an equal opportunity to participate in or benefit from its program simply because the person has a disability.

Paragraph (b)(1)(i) provides that it is discriminatory to deny a person with a disability the right to participate in or benefit from the aid, benefit or service provided by a public entity. Paragraph (b)(1)(ii) provides that the aids, benefits, and services provided to persons with disabilities must be equal to those provided to others, and paragraph (b)(1)(iii) requires that the aids, benefits, or services provided to individuals with disabilities must be as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as those provided to others. These paragraphs are taken from the regulations implementing section 504 and simply restate principles long established under section 504.

Paragraph (b)(1)(iv) permits the public entity to develop separate or different aids, benefits, or services

when necessary to provide individuals with disabilities with an equal opportunity to participate in or benefit from the public entity's programs or activities, but only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Paragraph (b)(1)(iv) must be read in conjunction with paragraphs (b)(2),(d), and (e). Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with a disability still has the right to choose to participate in the program that is not designed to accommodate individuals with disabilities. Paragraph (d) requires that a public entity administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

Paragraph (b)(2) specifies that, notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Paragraph (e), which is derived from section 501(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.

Taken together, these provisions are intended to prohibit exclusion and *segregation* of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards,

public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.

Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status. *For example*, it would be a violation of this provision to require persons with disabilities to eat in the back room of a government cafeteria or to refuse to allow a person with a disability the full use of recreation or exercise facilities because of stereotypes about the person's ability to participate.

Many commenters objected to proposed paragraphs (b)(1)(iv) and (d) as allowing continued *segregation* of individuals with disabilities. The Department recognizes that promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA and agrees that, in most instances, separate programs for individuals with disabilities will not be permitted. Nevertheless, section 504 does permit separate programs in limited circumstances, and Congress clearly intended the regulations issued under title II to adopt the standards of section 504. Furthermore, Congress included authority for separate programs in the specific requirements of title III of the Act. Section 302(b)(1)(A)(iii) of the Act provides for separate benefits in language similar to that in § 35.130(b)(1)(iv), and section 302(b)(1)(B) includes the same requirement for "the most *integrated* setting appropriate" as in § 35.130(d).

Even when separate programs are permitted, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of person with disabilities in general, *integrated* activities.

For example, a person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this section to require the person who is blind to avail himself or herself of the special tour. Modified participation for persons with disabilities must be a choice, not a requirement.

In addition, it would not be a violation of this section for a public entity to offer recreational programs specially designed for children with mobility impairments. However, it would be a violation of this section if the entity then excluded these children from other recreational services for which they are qualified to participate when these services are made available to nondisabled children, or if the entity required children with disabilities to attend only designated programs.

Many commenters asked that the Department clarify a public entity's obligation within the *integrated* program when it offers a separate program but an individual with a disability chooses not to participate in the separate

program. It is impossible to make a blanket statement as to what level of auxiliary aids or modifications would be required in the *integrated* program. Rather, each situation must be assessed individually. The starting point is to question whether the separate program is in fact necessary or appropriate for the individual. Assuming the separate program would be appropriate for a particular individual, the extent to which that individual must be provided with modifications in the *integrated* program will depend not only on what the individual needs but also on the limitations and defenses of this part. *For example,* it may constitute an undue burden for a public accommodation which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the integrated program. The Department cannot identify categorically the level of assistance or aid required in the integrated program.

Paragraph (b)(7) is a specific application of the requirement under the general prohibitions of discrimination that public entities make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability. Section 302(b)(2)(A)(ii) of the ADA sets out this requirement specifically for public accommodations covered by title III of the Act, and the House Judiciary Committee Report directs the Attorney General to include those specific requirements in the title II regulation to the extent that they do not conflict with the regulations implementing section 504. Judiciary report at 52.

Paragraph (c) provides that nothing in this part prohibits a public entity from providing benefits, services, or

advantages to individuals with disabilities, or to a particular class of individuals with disabilities, beyond those required by this part. It is derived from a provision in the section 504 regulations that permits programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with disabilities or a given class of individuals with disabilities to be limited to those individuals with disabilities. Section 504 ensures that federally assisted programs are made available to all individuals, without regard to disabilities, unless the Federal program under which the assistance is provided is specifically limited to individuals with disabilities or a particular class of individuals with disabilities. Because coverage under this part is not limited to federally assisted programs, paragraph (c) has been revised to clarify that State and local governments may provide special benefits, beyond those required by the nondiscrimination requirements of this part, that are limited to individuals with disabilities or a particular class of individuals with disabilities, without thereby incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities.

Paragraphs (d) and (e), previously referred to in the discussion of paragraph (b)(1)(iv), provide that the public entity must administer services, programs, and activities in the most integrated setting appropriate to the needs or qualified individuals with disabilities, i.e., in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible, and that persons with disabilities must be provided the option of declining to accept a particular accommodation.
